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IN THE
Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,
Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR BEAUTY ENTERPRISES, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF FOR BEAUTY ENTERPRISES, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Beauty Enterprises, Inc. ("BEI") is a closely held, 30-year-old Connecticut corporation with its principal office in Hartford. Its business has always been the wholesale distribution of beauty products (skin and hair care products,

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters of such consent have been filed with the Office of the Clerk of this Court.

cosmetics, etc.) designed primarily for African-Americans and other people of color. Today, it has customers in almost every region of the country, and in addition to its warehouse in Hartford, it has warehouses in: Birmingham, Alabama; Romulus, Michigan; Brooklyn, New York; Baltimore, Maryland; and Capital Heights, Maryland. It employs approximately 325 people. One third of its work-force is African-American. Twenty-two percent are Hispanic. Eleven percent are recent immigrants from countries such as Russia, Poland and Bosnia.

The question presented to this Court may well entail consideration of English-only workplace practices and policies such as the one that has been adopted by BEI. Specifically, this Court may decide in this case whether language can be equated with a person's national origin, such that the adoption and maintenance of an English-only practice or rule can be considered national origin discrimination in violation of a Title VI disparate impact regulation, at least under certain circumstances. BEI is vitally interested in this issue because it long ago adopted and has continuously maintained a Speak Only English rule for its workforce. A decision in this case may well have implications for BEI under Title VII. It is important, therefore, that this Court understand the very practical business interests that led BEI to adopt its English-only workplace rule. Reported cases confirm that these interests are not unique to BEI, but are present in most businesses with a similarly diverse workforce.

SUMMARY OF ARGUMENT

The Court should reverse the holding below in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), which otherwise could be construed to prevent English language workplace policies that are no more discriminatory than the English-language texts of the Declaration of Independence and Constitution of

the United States of America. The 11th Circuit's holding that "Title VI flatly prohibits . . . English language policies that cause disparate impact on the basis of national origin" (citing *Lau v. Nichols*, 414 U.S. 563 (1974)) contorts this Court's ruling in *Lau*, the underlying premise of which was that ethnically Chinese American citizens who do not understand English need to be taught English first in order to participate fully in public schools. Finally, amicus respectfully urges the Court to clarify that nothing in *Lau* or in any law of the United States should be construed to prohibit workplace policies that require utilization of our common American English language for sound business reasons, including workplace safety, harmony, and efficiency. American workers deserve no less.

ARGUMENT

I. *LAU V. NICHOLS* NEITHER SUPPORTS THE 11TH CIRCUIT HOLDING THAT "TITLE VI FLATLY PROHIBITS . . . ENGLISH LANGUAGE POLICIES THAT CAUSE DISPARATE IMPACT ON THE BASIS OF NATIONAL ORIGIN" NOR PROVIDES ANY NOTICE THAT "ENGLISH LANGUAGE POLICIES, WHICH CAUSE A DISPARATE IMPACT," MAY BE ILLEGAL.

The 11th Circuit held that "Title VI flatly prohibits . . . English language policies that cause disparate impact on the basis of national origin," *Sandoval v. Hagan*, 197 F.3d at 495, and that "*Lau* and it subsequent legislative history . . . unambiguously notify state recipients of federal funds that English language policies, which cause a disparate impact on the ability of non-English speakers to enjoy federal benefits, may violate Title VI." 197 F.3d at 497. *Amicus* respectfully suggests that *Lau*, if it remains good law, does not support the Court of Appeals' holding that Alabama's English-language requirements for drivers constitutes national origin

discrimination in violation of regulations issued under Section 602 of Title VI. Assuming *arguendo Lau* had at one time supported such a proposition, it has been overruled *sub silentio* by this Court's more recent jurisprudence. Likewise, *Lau* should not be read to put BEI or any other American company on notice that an English language workplace rule such as the one adopted by BEI "will [be] presume[d to] violate[] Title VII." 29 C.F.R. 1606.7(a) (EEOC's guideline for "Speak-English-only rules").

The lengths to which the Court of Appeals went in discussing *Lau* in the wake of this Court's decisions in *Alexander v. Choate*, 469 U.S. 287 (1985), *Guardians Assn. v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983), *University of California Board of Regents v. Bakke*, 438 U.S. 265 (1978) and *United States v. Fordice*, 505 U.S. 717 (1992), demonstrate the need for this Court to clarify this uncertain body of law.

In *Lau*, the Supreme Court held that the failure of the San Francisco public schools to either provide English language instruction to Chinese-speaking students or teach these students in Chinese violated regulations promulgated by the Department of Health, Education and Welfare ("HEW") pursuant to its authority under Section 602 to enforce the nondiscrimination provision in Section 601. The underlying premise of *Lau* was that ethnically Chinese American citizens need to be taught English first in order to participate fully in the federally funded San Francisco public schools.

In several respects, *Lau* neither dictates nor suggests the holding of the Court of Appeals. First, the Court in *Lau* did not determine the remedy for this violation. Indeed, it noted that "[n]o specific remedy is urged upon us." 414 U.S. at 564. Here, the Court of Appeals did not hold illegal Alabama's failure to provide English-language instruction to enable non-

English speaking persons to qualify for a driver's license.[2] Instead, it found illegal the failure of Alabama to allow non-English speaking persons the privilege to drive without learning even the basics of English. This finding is inconsistent with the remedy implicitly recommended by this Court in *Lau:* "the [school] district must take affirmative steps to rectify the language deficiency . . . ." 414 U.S. at 568 (quoting HEW clarifying guidelines) (internal quotation marks omitted).

Second, three concurring Justices in *Lau* focused on interpretive guidelines issued by the HEW Office of Civil Rights, which "clearly indicate that affirmative efforts to give special training for non-English speaking pupils are required by Title VI as a condition for receipt of federal aid to public schools." 414 U.S. at 570 (Stewart, J., with Burger, C.J. and Blackmun, J., concurring in the result). Unlike the HEW regulations and guidelines at issue in *Lau*, DOT and DOJ regulations do not require any affirmative steps to be taken by grant recipients with respect to non-English speaking drivers.

Third, the HEW regulations at issue in *Lau* pertained to education, not the public health and safety. Where education is concerned, federal requirements are geared to ensuring that all students are given a meaningful education. Where the public health and safety is implicated, federal requirements ensure that labels, instructions, warnings, and signals are in English so that they can be understood and observed. For those performing safety functions, including commercial operators of motor vehicles, federal requirements provide that they must be able to speak, read, write, and understand the English language. While the Eleventh Circuit did not accept the safety rationale behind Alabama's English-language requirement, it is obvious that the English-language

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[2] Alabama reportedly provides English-language instruction under several programs.

requirements of federal agencies, most notably the grantor department in this case, DOT, are based primarily if not entirely on safety.

Thus, far from following *Lau*, the Court of Appeals transformed *Lau* into something this Court has never countenanced, and should not embrace now. Rather, amicus respectfully urges the Court to clarify that neither *Lau* nor any other law of the United States prohibits workplace policies that require utilization of our common American English language for sound business reasons, including workplace safety, harmony, and efficiency.

II. NOTHING IN TITLE VI OR TITLE VII PROHIBITS WORKPLACE POLICIES THAT REQUIRE UTILIZATION OF OUR COMMON AMERICAN ENGLISH LANGUAGE FOR SOUND BUSINESS REASONS.

For the purposes of comparing the substantive law underlying this case (Title VI) with the law upon which the EEOC has threatened to sue Beauty Enterprises (Title VII), Title VI and Title VII contain identical nondiscrimination proscriptions. Section 601 of Title VI, which is incorporated by reference into Section 602, provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. §2000d. Title VII prohibits employment practices that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(2).

Regardless of the "contractual framework [that] distinguishes Title [VI] from Title VII," *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 286 (1998), they both contain the term "national origin" within their respective nondiscrimination proscription. Accordingly, any acknowledgment by this Court that language can and should be equated with "national origin" will substantively affect "the law" to which Beauty Enterprises and other American companies will have to conform their workplace practices.

Specifically, were this Court to affirm the 11th Circuit below, it would effectively ratify the EEOC's Speak English Only rule guidelines and place its imprimatur on the unwarranted presumption of discriminatory impact that those guidelines establish. In the process of ratifying the EEOC guidelines, this Court would effectively overrule the two federal court decisions that have rejected the guidelines. In *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), the 9th Circuit held: "We do not reject the English-only rule Guideline lightly[,]" but "[w]e will not defer to an administrative construction of a statute where there are compelling indications that it is wrong." (internal quotations and citations omitted). The Court of Appeals added:

> We are not aware of, nor has counsel shown us, anything in the legislative history to Title VII that indicates that English-only policies are to be presumed discriminatory. Indeed, nowhere in the legislative history is there a discussion of English-only policies at all.

Id. at 1490. Likewise, in *Long v. First Union Corp. of America*, 894 F. Supp. 933 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996), the District Court held that: "This Court is not bound by the EEOC guidelines, . . . and does not find the language of Title VII supportive of the EEOC's

conclusion." 894 F. Supp. at 940 (quoting *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94-95 (1973)).

Were this Court to affirm the 11th Circuit, employers in BEI's position – *i.e.*, employers with no intention of doing anything discriminatory and who simply wish to create a workplace that is safe and free of ethnic tension for its diverse workforce – would no longer be able to use a Speak English Only rule to accomplish these objectives, absent business *necessity*, as determined by some outside agency, either the EEOC and/or a federal district court.

BEI's English language workplace rule was the result of a sound and reasoned business decision. More than twenty years ago, as the then fledgling BEI was starting to grow, its founder and President, Robert Cohen, personally observed that there was tension and low morale within certain segments of his warehouse workforce and that this was adversely affecting the efficiency of the operation. He was determined to discover the reasons, and, to this end, embarked upon an investigation that consisted of discussions with employees and extensive observations of employee behavior in BEI's warehouse. Cohen discovered that the principal cause of the tension and low morale was that there were English-only speaking employees, including many African-Americans, who thought that they were being ridiculed by Spanish-speaking employees in a language they did not understand – Spanish. On several occasions, this perception actually led to fights in the warehouse.

This discovery led Cohen to consider a Speak Only English rule. He concluded that such a rule would not only eliminate these distressing encounters between his Spanish-speaking and non-Spanish-speaking workers, but it would eliminate, or at least reduce, other problems as well, one of which was safety-related.

A distribution company's warehouse operation is much like a supermarket, with people using shopping cart-type vehicles and moving from place to place picking items from shelves and depositing them in their carts. However, unlike a supermarket, the vehicles BEI employees used were large, the items picked were frequently large boxes and the shelves on which items were stored were high. To retrieve items high on these shelves, employees had to climb ladders and maneuver down from these ladders with items in their hands. At the same time, and unlike a supermarket, forklift trucks moved amongst the aisles delivering product from station to station and actually placing items on shelves. The potential for accidents – boxes falling, people falling off ladders, collisions with forklifts and the like – was always present, and, in fact, this potential was at the time materializing with alarming frequency. Cohen believed that a Speak Only English rule would reduce the potential for accidents and promote employee safety, because it would facilitate communication among employees during their work and allow for understandable warnings from one employee to another. Experience has validated this belief.

Cohen also believed that a Speak Only English rule would overcome another impediment to efficiency, specifically the "out of stock" condition. In an operation like BEI's, the absence of an item on a shelf – an "out of stock" condition – is a constant problem. It is also a source of frustration for employees who are "picking" an order that calls for an item temporarily out of stock. The warehouse workforce includes individuals with responsibility for correcting these "out of stock" conditions. These individuals should know whether the condition is the result of not having the product anywhere at the facility, or if it is simply the result of not moving product from the receiving area to the warehouse shelves in a sufficiently timely manner.

In a perfect world, pickers would quickly communicate the existence of an out of stock condition to warehouse employees, and these employees, in turn, would be able to tell the pickers when the problem would be eliminated. However, frequently there was a lack of communication. Spanish- or Russian-speaking pickers would congregate and complain to each other in their native tongues about what turned out to be an out of stock condition, but non-Spanish or non-Russian Speaking employees, as the case may be, in a position to address these complaints would not understand the complaints and, therefore, fail to address them in a timely fashion. Cohen concluded that a Speak Only English rule could overcome these problems and, in this way, promote a more efficient operation. Experience has validated this conclusion.

For these reasons, and generally to avoid confusion that was occurring in a warehouse where but for the rule a significant number of different languages could conceivably have been spoken, BEI adopted a Speak Only English rule – a rule requiring employees to speak only English while they were working. At lunch or on their breaks, employees are free to speak in the language of their choosing. Cohen understood that this rule would deprive employees of the ability to speak in the language of their choice while they were working, but the ability to speak and write English had always been (and remains) a requirement for employment at BEI. BEI's workforce has always been at least bilingual. Hence, he concluded that BEI could promote its interests in having such a rule without imposing any hardship on employees. Indeed, he believed that such a rule would make BEI a more pleasant and less frustrating place for employees to work. Experience has validated this belief.

BEI's Speak Only English rule produced the hoped for results. Not only were tensions reduced, but safety incidents

decreased and efficiency improved. And for more than twenty years, there were few, if any, complaints from employees. The vast majority of the workforce, regardless of their native language, has always endorsed the rule and enthusiastically embraced it.

Recently, however, a local Hispanic politician (a state legislator from Hartford) colluded with a disgruntled former employee, another Hispanic, and enlisted a small group of BEI Hispanic employees (fifteen to be exact[3]), to file disparate impact national origin discrimination charges with the EEOC based on BEI's workplace Speak Only English rule. The motivation for this action remains unclear. Nonetheless, despite the fact that the EEOC's guideline on the subject, deeming such rules presumptively illegal,[4] has been rejected by at least two Courts of Appeals, the EEOC invoked its "Speak-English-only rules" guideline to find reasonable cause and threaten suit based on an alleged disparate impact upon BEI's Spanish-speaking employees.

A Supreme Court decision in the instant case squarely holding that language cannot be presumptively equated with national origin will end this threat to BEI's long standing rule and preserve the workplace benefits this rule has produced – benefits not only to BEI's business, but also to its employees whatever their national origin. In contrast, a contrary decision may well require BEI again to experience the very real and very serious problems that its Speak Only English rule has largely eliminated.

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[3] Of these fifteen, only five are full-time BEI employees. The remaining ten are placed individuals from temporary staffing organizations.

[4] The EEOC guideline ("Speak-English-only rules") provides that the EEOC "will presume that a rule [requiring employees to speak only English at all times in the workplace] violates Title VII and will closely scrutinize it." 29 C.F.R. 1606.7(a). "An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity." 29 C.F.R. 1606.7(b).

Amicus respectfully urges the Court to clarify that nothing in *Lau* or in any law of the United States should be construed to prohibit workplace policies that require utilization of our common American English language, at least not where there are legitimate business reasons for such policies (as opposed to business necessity) and the policies are not an instrument of intentional discrimination on the basis of national origin. American employers, as well as American workers, deserve no less.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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